RECENT DECISIONS.

JEROME MICHAEL, *Editor-in-Charge.*
JOHN VANCE HEWITT, *Associate Editor.*

ATTORNEY AND CLIENT—ATTORNEY'S LIEN—RIGHT OF COUNSEL TO LIEN.—The appellant, who had rendered services as counsel, but who was not the attorney of record, refused to surrender papers of his client until compensated for disbursements. *Held,* two judges dissenting, he was entitled to a lien. *Harding* v. *Conlon* (N. Y. 1911) 46 N. Y. L. J. No. 66.

It is elementary that an attorney has a lien upon his client's papers in his possesion for all sums due him, *Dennet* v. *Cutts* (1840) 11 N. H. 163; *Mathot* v. *Triebel* (N. Y. 1904) 98 App. Div. 328, which, though originally a special lien, has become a general one. *Savings Bank* v. *Todd* (1873) 52 N. Y. 489. The counsel, however, as distinguished from the attorney, seems never to have been entitled to a lien. This was a logical result of the general presumption that his services were always gratuitous. 3 Bl. Com. (Lewis's ed.) 28. The counsel, furthermore, could not recover fees even upon an express contract with his client, which was regarded as absolutely void as against public policy. *Kennedy* v. *Broun* (1863) 13 C. B. N. S. 676. In this country, however, not only is there no longer any distinction between attorneys and counsel with resepect to fees, the latter being equally entitled to compensation, 8 COLUMBIA LAW REVIEW 500, but in addition, all other differences have been practically eliminated. *In re Paschal* (1870) 10 Wall. 483; *Ingraham* v. *Leland* (1847) 19 Vt. 304. The decision of the principal case, though novel, therefore seems to be a logical extension of the law of liens. The lien so given would, of course, cover only papers in his possession, for a counsel is not entitled to the peculiar lien upon the judgment which is given the attorney of record. *Brown* v. *Mayor* (N. Y. 1877) 9 Hun 587.

CARRIERS—DAMAGE IN EXCESS OF FREIGHT CHARGES—CARRIER'S REFUSAL TO DELIVER WITHOUT PAYMENT OF FREIGHT AS BREACH OF CONTRACT.—The plaintiff sued for the value of a shipment damaged in transit to an amount greater than the freight charges, upon the theory that the defendant's refusal to deliver until paid the freight was a breach of the contract of carriage. *Held,* the plaintiff could not recover. *Wilensky* v. *Central of Georgia Ry. Co.* (Ga. 1911) 72 S. E. 418.

A carrier may rightfully retain possession of a shipment until the freight is paid, solely by virtue of the carrier's lien. 1 Jones, Liens, (3rd ed.) § 262. This lien, however, is only co-extensive with its right to claim freight, and if the consignment is damaged in transit in excess of the freight charges, unless by contract the freight is due regardless of the condition of the goods, see *Boggs* v. *Martin* (Ky. 1852) 13 B. Mon. 239, it is generally held that the carrier loses its lien. *Ewart* v. *Kerr* (S. C. 1839) 1 Rice 203; *Humphreys* v. *Reed* (Pa. 1841) 6 Whart. 435. If the carrier withholds the shipment in such a case, the consignee may replevy it, *Dyer* v. *Grand Trunk Ry. Co.* (1869) 42 Vt. 441, or recover its value in trover, *Mo. Pac. Ry. Co.* v. *Peru-Van Zandt Co.* (1906) 73 Kan. 295, or, it would seem, in an action in

quasi-contract. Keener, Quasi-Contracts, 195. The carrier's retention of the property without right would appear to amount also to a breach of the contract of carriage, enabling the consignee to sue thereon for its value. The contrary result reached in the principal case, which is the first to decide the point, is apparently based upon the fact that a consignee may not refuse to receive goods partially damaged and then hold the carrier for their value, 3 Hutchinson, Carriers, (3rd ed.) § 1365; *cf. Brand* v. *Weir* (N. Y. 1899) 27 Misc. 212. This principle, however, seems inapplicable where the consignee desires to take the goods, but the carrier withholds them without right.

CONFLICT OF LAWS—TAX LIABILITY—EXTRA-TERRITORIAL ENFORCEMENT.—The State of Maryland sought to collect a tax, levied upon personalty while defendant was a resident of that State, by means of a common law action in New York. *Held,* the suit was not maintainable. *Maryland* v. *Turner* (1911) 46 N. Y. Law Journal No. 47. See Notes, p. 60.

CONSTITUTIONAL LAW—RIGHT TO BEAR ARMS—VALIDITY OF REGULATION.—A statute declared it to be illegal for any one, other than certain officers, to have a revolver about his person, except in his home or place of business, without first obtaining a license. *Held,* the statute was constitutional. *Strickland* v. *State* (Ga. 1911) 72 S. E. 260.

It is now settled beyond question that the validity of statutes regulating the right to bear arms is to be determined in the light of the State constitutions alone, the Federal Constitution imposing an inhibition only on acts of Congress. *Presser* v. *Ill.* (1885) 116 U. S. 252; but see *In re Brickey* (1902) 8 Ida. 597. In view of the origin and purpose of the provisions respecting this right, *Aymette* v. *State* (Tenn. 1840) 2 Humph. 154, and of the police power of the State, *State* v. *Workman* (1891) 35 W. Va. 367; *Carroll* v. *State* (1872) 28 Ark. 99, it is generally held that while the legislature cannot forbid citizens to bear weapons of war, *Andrews* v. *State* (Tenn. 1871) 3 Heisk. 165; *In re Brickey, supra,* it may restrict the exercise of the right to proper persons, *State* v. *Hogan* (1900) 63 Oh. St. 202; *cf. Comw.* v. *Murphy* (1896) 166 Mass. 171, proper places, *Hill* v. *State* (1866) 63 Ga. 472, or proper circumstances. *State* v. *Duke* (1875) 42 Tex. 455. On the other hand the possession of barbarous weapons, *English* v. *State* (1872) 35 Tex. 473; *Fife* v. *State* (1876) 31 Ark. 455; but see *Nunn* v. *State* (1846) 1 Ga. 243, and the carrying of concealed weapons of any character, *Nunn* v. *State supra; State* v. *Jumel* (1858) 13 La. Ann. 399; *State* v. *Reid* (1840) 1 Ala. 612; *contra, Bliss* v. *Comw.* (Ky. 1822) 2 Litt. 90, may be made illegal under all circumstances. Furthermore, licensing as a mode of regulation would seem to be not inconsistent with the constitutional provisions and is not without precedent. *State* v. *Newson* (N. C. 1844) 5 Ired. 250. It is to be observed that the statute here considered regulates carrying weapons abroad only, and, thus restricted, avoids the objection based on the due process clause, urged against a more drastic New York statute, which makes the mere possession of arms illegal unless licensed. See 27 *Bench and Bar* 70.

CORPORATIONS—MEETING OF DIRECTORS—NOTIFICATION OF MEMBERS.—Two members of a board of three directors held a meeting without giving notice to the third. *Held,* notice was unnecessary, since cir-

cumstances were such that there was a moral certainty that he would not attend and since, being personally interested in the business transacted, he could not have voted legally. *In re Kenwood Ice Co.* (D. C. D. Minn. 1911) 189 Fed. 525.

The rule that notice to all members is essential to the validity of the transactions of a directors' meeting, is generally strictly observed, *Doernbecher* v. *Lumber Co.* (1892) 21 Ore. 573; *Pike Co.* v. *Rowland* (1880) 94 Pa. 238; *contra, Bank* v. *Flour Co.* (1885) 41 Oh. St. 552; *Edgerly* v. *Emerson* (1851) 23 N. H. 555, unless the absent director is inaccessible. *Chase* v. *Tuttle* (1889) 55 Conn. 455. The reasons for the rule are that the stockholders are entitled to the combined wisdom of all the directors, *Doernbecher* v. *Lumber Co. supra,* and that the minority should have opportunity to advise and convince their associates. *Cf. Commw. ex rel.* v. *Cullen* (1850) 13 Pa. 133. The first ground of the decision of the principal case seems untenable, since even the statement by an absentee that he will not attend, is not deemed to excuse the failure to notify him. *In re Portuguese Copper Mines* (1889) L. R. 42 Ch. D. 160; *cf. Stafford etc. Ry Co.* v. *Middle River M'f'g Co.* (1907) 80 Conn. 37. The second ground is more persuasive, for the authorities generally declare that a director is disqualified from voting on a proposition in which he has a personal interest. *Smith* v. *Immigration etc. Ass'n* (1889) 78 Cal. 289; *Higgins* v. *Lansingh* (1895) 154 Ill. 301. And yet, since it has never been supposed that the mere presence of the interested director is objectionable, see *Keans* v. *N. Y. etc. Ferry Co.* (1896) 40 N. Y. Supp. 366, it would appear that, having the right to be present, he has the right to be notified.

CORPORATIONS—RELEASE OF STOCK SUBSCRIPTION—RIGHTS OF CREDITORS.—An action on corporate indebtedness was brought under a special liability statute, against stockholders who had been released from half of their stock subscription because of their inability to pay for the whole. *Held,* the release was binding against a subsequent creditor. *Thomas* v. *The Wentworth Hotel Co.* (Cal. 1911) 117 Pac. 1041.

In a few States a shareholder is ratably liable by statute for all corporate debts, 9 COLUMBIA LAW REVIEW 285, in addition to his liability on his stock subscription. Thompson, Liability of Stockholders, § 37. A compromise of this subscription made by the corporation in good faith and for a valuable consideration, *Zirkel* v. *Joliet etc. Co.* (1875) 79 Ill. 334, other than a mere surrender of the stock, *Farnsworth* v. *Robbins* (1887) 36 Minn. 369, is binding on all creditors. A bare release, on the other hand, while usually good as against the corporation, *Ins. Co.* v. *Swigert* (1890) 135 Ill. 150, especially when acquiesced in by all the stockholders, *Bouton* v. *Dement* (1887) 123 Ill. 142, is never valid as against existing, *Camden* v. *Stuart* (1891) 144 U. S. 104; 4 Thompson, Corporations, (2nd ed.) 4939, though in some States binding on subsequent creditors. *Shoemaker* v. *Lumber Co.* (1897) 97 Wis. 585. Most courts, however, allow both classes indifferently to impeach such release, *Upton* v. *Tribilcock* (1875) 91 U. S. 45; *Sprague* v. *National Bank* (1898) 172 Ill. 149, on the theory that the subscribed capital is a trust fund for creditors, *Wood* v. *Dummer* (1824) 3 Mason 308, or that it forms the basis of credit, *Martin* v. *Land Co.* (1896) 94 Va. 28, and that any reduction of the fund is a fraud on those dealing with the corporation. Under the latter view the release should be impeachable only by those

creditors who actually relied on the total. *Coit* v. *N. C. etc. Co.* (1882) 14 Fed. 12 *contra; Edwards* v. *Schillinger* (1910) 245 Ill. 231. But in a jurdisdiction, like that of the principal case, *Kennedy* v. *Savings Bank* (1892) 97 Cal. 93, in which the theory of the corporate entity has given way to the view that corporate creditors contract directly with the stockholders, 9 COLUMBIA LAW REVIEW 285, it would seem that neither a release nor a compromise could be valid as against existing creditors, since they alone should have the power to release their promisors. Subsequent creditors, however, could attack neither, since they obviously have entered into no agreement with the released stockholders.

CRIMINAL LAW—CONSPIRACY TO CONCEAL GOODS FROM A TRUSTEE IN BANKRUPTCY.—The defendants were indicted under a Federal statute for conspiring to conceal a bankrupt's goods from his trustee in bankruptcy. U. S. Rev. St. § 5440. (U. S. Comp. St. 1901, p. 3676). The property was so effectually hidden that no trustee was ever appointed. *Held,* the defendants were guilty of the crime alleged. *Radin et al.* v. *U. S.* (C. C. A. 2nd Cir. 1911) 189 Fed. 568.

Although a conspiracy to accomplish any unlawful object or lawful object by unlawful means was amenable to the common law, *People* v. *Mather* (N. Y. 1830) 4 Wend. 229, only an agreement to commit a crime defined by statute is punishable as a conspiracy in the Federal courts. *U. S.* v. *Martin* (1870) 4 Cliff. 156. The defense, often successfully relied upon in the case of attempts, *Regina* v. *Philips* (1839) 8 Carr. & P. 736; *contra, Comw.* v. *Green* (Mass. 1824) 2 Pick. 380, that the act under contemplation would not have been a crime if completed, *Comw.* v. *McDonald* (Mass. 1850) 5 Cush. 365; *Hamilton* v. *State* (1871) 36 Ind. 280, is not applicable to conspiracy, since the latter is a distinct substantive crime. *State* v. *Buchanan* (Md. 1821) 5 H. & J. 317. Although it contemplates the performance of some act in the future, *Alkon* v. *U. S.* (1908) 163 Fed. 810, the offence is complete, nevertheless, when the agreement is made and some overt act performed. *U. S.* v. *Reichert* (1887) 32 Fed. 142. If its ultimate consummation is possible, it is unimportant whether the agreement has ever been completely performed. *Regina* v. *Banks* (1873) 12 Cox C. C. 393; *Williamson* v. *U. S.* (1908) 207 U. S. 425. Furthermore, although penal statutes should be strictly construed, *Andrews* v. *U. S.* (1842) 2 Story 202, a construction so literal as to defeat the obvious intention of the legislative body should not be adopted. *U. S.* v. *Williams* (1908) 159 Fed. 310. The statute prohibiting a conspiracy to conceal goods from a trustee in bankruptcy is clearly enacted to prevent fraud on creditors. The court in the principal case therefore correctly held that the fact that no trustee had ever been appointed was immaterial, and a different construction would place a premium on success in carrying out a conspiracy.

DAMAGES—CONVERSION—HIGHEST INTERMEDIATE VALUE.—The plaintiff took possession of lumber belonging to the defendant, and the defendant sought damages for the conversion. *Held,* the measure of the defendant's damage was the value of the property with interest, and the jury might give the highest value up to the time of the trial. *Sizer* v. *Dopson et al* (S. C. 1911) 72 S. E. 464.

Generally, the measure of damages in trover is the value of the property at the time of conversion with interest. 2 Sedgwick, Dam-

ages, (8th ed.) § 493. This rule is not only the most just, since it will ordinarily provide full compensation for the owner, but the most logical, since the converter acquires the property in the chattel upon conversion, the rightful owner being left with a right of action or of recaption, Ames, Disseisin of Chattels, 3 Harv. L. Rev. 23, 313, and upon satisfaction of judgment, an indefeasible title, which is said to relate back to the time of conversion. *Smith* v. *Smith* (1872) 51 N. H. 571. He must therefore assume the burdens of ownership upon the consummation of his tort, and must bear subsequent injury to the property. *Suppiger* v. *Gruaz* (1891) 137 Ill. 216. Under this view the measure of damages cannot ordinarily depend upon the nature of the property. But many courts nevertheless allow the highest value between the taking and the trial, if the property is subject to constant fluctuations in value. 4 Sutherland, Damages, (3rd ed.) § 1118. This makes the damage speculative and frequently in excess of a just indemnity, and while a departure from the general rule may be justified if the plaintiff prove that he has actually suffered a loss beyond the value of the property when converted, *Suydam* v. *Jenkins* (N. Y. 1850) 3 Sandf. 614, or where, as in the conversion of stock by a broker, the defendant, because of his fiduciary capacity, should not be allowed to profit by his wrong, 10 COLUMBIA LAW REVIEW 754, the rule of the principal case would seen applicable only when exemplary damages are to be given. See 2 Sedgwick Damages, (8th ed.) § 525.

DAMAGES—EJECTION FROM PUBLIC PLACE—MENTAL SUFFERING.—The plaintiff having purchased a ticket of admission to the defendant's bathing establishment, was ejected, and in a suit for breach of contract recovered compensatory damages for the indignity she suffered. *Held,* such damages were properly awarded. *Aaron* v. *Ward* (N. Y. Ct. of Appeals, Nov. 21, 1911.) Not yet reported.

Since the court concedes that damages for mental suffering are not ordinarily recoverable in contract actions, the recovery can be sustained only on the ground that the defendant's liability is similar to that of a common carrier. Businesses like the one in question are generally considered quasi-public in character, and in some measure subject to legislative regulation. *People* v. *King* (1888) 110 N. Y. 418; *Greeneberg* v. *Western Turf Ass'n* (1903) 140 Cal. 357. Unlike common carriers, however, it is their undoubted right, in the absence of statute, to deny anyone admission. *People ex rel.* v. *Flynn* (1907) 189 N. Y. 180; *Wood* v. *Leadbitter* (1845) 13 M. & W. 838. Any suit must therefore be brought on the breach of contract involved in revoking the license of admission. *McCrea* v. *Marsh* (Mass. 1858) 12 Gray 211. In like actions against common carriers, damages may be recovered for the indignity suffered in expulsion, because the carrier is deemed to contract to protect its passengers from such insults. *Gillespie* v. *Brooklyn Heights R. R. Co.* (1904) 178 N. Y. 347; *cf. Craker* v. *Chicago etc Ry. Co.* (1875) 36 Wis. 657. But where the defendant is under no duty to admit the plaintiff, it can hardly be put on the same footing with a carrier in cases of this kind. It is, however, largely a question of public policy, in determining the status of establishments tinged with a public interest, *People* v. *King supra,* and the tendency is to increase their liabilities and duties, both by legislation and decision. N. Y. Laws 1895 c. 1042; *O'Callaghan* v. *Dellwood Park Co.* (1909) 242 Ill. 336; *Francis* v. *Cockrell* (1870) L. R. 5 Q. B. 184.

DIVORCE—DESERTION—CONDONATION—REVIVAL.—After the defendant's desertion for the statutory period, the plaintiff cohabited with her for four days. When she subsequently refused to accompany him to his home, he sought a divorce under a statute authorizing a divorce for desertion for three consecutive years next prior to the filing of the libel. Rev. Laws Ch. 152, § 1. *Held,* the plaintiff had no cause of action. *Laflamme* v. *Laflamme* (Mass. 1911) 96 N. E. 62.

At common law condonation of matrimonial offences constituting cause for divorce, is a forgiveness conditioned upon subsequent good behavior, 2 Bishop, Mar. Div. and Sep., 308, 309, and, until a breach of this condition, acts as a defence rather than as a destruction of the original cause of action. *Clark* v. *Clark* (1906) 191 Mass. 128. To negative the effect of condonation, it is unnecessary that the act complained of be repeated, *Durant* v. *Durant* (1825) 1 Hag. Ec. 733, 761, or that a new offence be in itself a ground for divorce, *Robbins* v. *Robbins* (1868) 100 Mass. 150, but any act of conjugal unkindness by the offending party is sufficient. *Hoffmire* v. *Hoffmire* (N. Y. 1837) 3 Edw. Ch. 173; *Warner* v. *Warner* (1879) 31 N. J. Eq. 225. The so-called revival of the cause of action by such an act is therefore only the breach of the condition of forgiveness, by which the defence to the original cause of action, which has never ceased to exist, is destroyed. The defendant's redesertion in the principal case would ordinarily have amounted to a breach having this effect, Tiffany, Dom. Rel., (2nd ed.) 108, and the plaintiff could have recovered if the cohabitation had not made it impossible for him to allege the uninterrupted desertion required by statute. *Burk* v. *Burk* (1883) 21 W. Va. 445; *Phelan* v. *Phelan* (1890) 135 Ill. 445. The statute, however, creates the novel situation where the same act is both a condonation and a destruction of the original cause of action.

ELECTION OF REMEDIES—INCONSISTENT RIGHTS—EFFECT OF SUIT IN EQUITY FOR THE RESCISSION OF A LEASE.—In summary proceedings by the landlord to recover possession, the tenants set up a counter-claim based upon a contract for the rescission of which a suit in equity had been previously filed. *Held,* the commencement of the suit in equity for rescission was not an election which would bar a subsequent suit at law upon the contract. *Houston Mercantile Co.* v. *Powell & King* (1911) 130 N. Y. Supp. 274. See Notes, p. 62.

EMINENT DOMAIN—COMPENSATION—GENERAL BENEFITS.—In condemnation proceedings the commissioners set off against the consequential damage to the part of the defendant's land which was not taken, the general benefits which it received from the assurance of the construction of the proposed railroad. *Held,* the commissioners' action was proper. *New York, W. & B. Ry. Co.* v. *Siebrecht et al.* (1911) 130 N. Y. Supp. 1005.

The just compensation which must be given for property taken for a public use, includes not only the value of the land actually taken, but also the direct damage caused to the owner's remaining property. 2 Lewis, Eminent Domain, (3rd ed.) § 686; *Bangor, etc. R. R. Co.* v. *McComb* (1872) 60 Me. 290. Just compensation, however, means only a fair equivalent for the loss sustained, and it is therefore generally held that benefits which are peculiar to the remaining land may be set off against the damage it suffers. Cooley, Constitutional Limitations,

(7th ed.) 820; *Clark* v. *Worcester* (1878) 125 Mass. 226; *Bauman* v. *Ross* (1896) 167 U. S. 548. But those benefits which result to the community at large from the proposed improvement should not be considered in estimating compensation, since they are speculative in character, and since it is unjust to charge the land-owner with their value. As a member of the public he is entitled to share them without paying therefor. 2 Lewis, Eminent Domain, (3rd ed.) § 693; *Nicholson* v. *N. Y., etc. R. R. Co.* (1852) 22 Conn. 74. In many jurisdictions, including that of the principal case, the importance of this distinction between special and general benefits is nevertheless denied, and the measure of damages adopted is the decrease, due to the taking, in the market value of the residue of the land. *Bohm* v. *Met. Ry Co.* (1892) 129 N. Y. 576; *Young* v. *Harrison* (1855) 17 Ga. 30.

EMINENT DOMAIN—LAND ALREADY IN PUBLIC USE.—The Secretary of the Treasury instituted condemnation proceedings to acquire a portion of a public alley for a post office site, relying on an act of Congress which did not specifically authorize the appropriation of land already in public use. *Held,* the authorization was sufficient. *U. S.* v. *City of Tiffin et al.* (C. C. N. D. Ohio 1911) 190 Fed. 279.

The power of eminent domain being in derogation of private right, an authorization of its exercise is to be construed strictly. *Weckler* v. *Chicago* (1871) 61 Ill. 142. It has, accordingly, been consistently held that land already devoted to a public use cannot be condemned, *McCullough* v. *Board of Education* (1876) 51 Cal. 418, unless the authorization so to do is express, *Eastern R. R. Co.* v. *B. & M. R. R.* (1872) 111 Mass. 125, or necessarily to be implied. *Evergreen Cemetery Assn.* v. *New Haven* (1875) 43 Conn. 234; 7 COLUMBIA LAW REVIEW 504; and see *U. S.* v. *Gettysburg Ry. Co.* (1896) 160 U. S. 668, 685. Such an implication may arise from an authorization in general terms where the land is reasonably necessary for the second use and there is no danger to the first of serious impairment. 2 Lewis, Eminent Domain, § 440. While an application of these considerations to the facts of the principal case might have sustained the result reached, the court based its decision on the theory that the rule had no application as against the sovereign. It is to be noted, however, that this attribute of the sovereign resides in the legislature alone, *Brigham* v. *Edmands* (Mass. 1856) 7 Gray 359; 5 COLUMBIA LAW REVIEW 389, and it is to the expressions of the legislative will that the rule of strict construction applies. There has been no previous suggestion that an exception is to be made where such an expression takes the form of a delegation of power to an executive officer. See *Kohl* v. *Hannaford* (1875) 5 Oh. Dec. 306. On the contrary, the precise question raised by the principal case has been considered by the Supreme Court and disposed of simply on the ground that the statutory authority was sufficiently clear *U. S.* v. *Gettysburg Ry. Co. supra.*

INSURANCE—FIRE POLICY—DIVISIBILITY.—The defendant insured the plaintiff's millinery stock and store fixtures in one policy for a gross premium, with a separate valuation on each item. The policy contained a condition in the form of an "inventory and iron safe" provision. *Held,* the policy was entire and a breach of the condition avoided it *in toto*. *Joffe & Mankowitz* v. *Niagara Ins. Co.* (Md. 1911) 81 Atl. 281. See Notes, p. 65.

INSURANCE—FORFEITURE BY SUICIDE—WAIVER OF STATUTORY PROVISION. —By statute an insurer is released from his contract by the suicide of the insured. Civil Code 1910, § 2500. The policy stipulated that the company should not be liable if the insured died by his own act during the first year. The insured killed himself after this period. *Held,* one judge dissenting, the beneficiary could recover since the stipulation waived the statute. *Mutual Life Ins. Co.* v. *Durden* (Ga. 1911) 72 S. E. 295.

Suicide in pursuance of an intention formulated at the time of procuring the policy voids the contract; *Smith* v. *N. B. Society* (1890) 123 N. Y. 85; *cf. Parker* v. *Des Moines Life Assn.* (1899) 108 Ia. 117; and although the contract is silent as to suicide and is made in good faith, the wilful self-destruction of the insured prevents recovery by his estate, since the insurer impliedly excepts the risk of suicide and since public policy forbids its assumption. *Ritter* v. *Mutual Life Ins. Co.* (1898) 169 U. S. 139; *cf. The Amicable Society* v. *Bolland* (1830) 4 Bligh N. R. 194. Nevertheless, a beneficiary, under these circumstances, may generally recover, *Morris* v. *Life Assurance Co.* (1898) 183 Pa. 563; *contra, Hopkins* v. *Northwestern Co.* (1899) 94 Fed. 729, upon the theory that an interest was vested in him upon the formation of the contract which the subsequent act of the insured could not defeat. *Patterson* v. *Mutual Premium Co.* (1898) 100 Wis. 118; *cf. Campbell* v. *Supreme Conclave* (1901) 66 N. J. L. 274. This distinction seems more sentimental than logical, for the beneficiary's interest never included the risk of suicide, since the insurer did not assume the risk in fact and could not because of public policy. In the principal case the stipulation shows its actual assumption, but it is difficult to see how it obviates the objection of public policy, since the statute, though directory in tone, would seem to be declaratory of the public policy of the jurisdiction. See *Keller* v. *Travelers' Ins. Co.* (1894) 58 Mo. App. 557; and *cf. Whitfield* v. *Aetna Life Ins. Co.* (1907) 205 U. S. 489.

INSURANCE—MUTUAL COMPANIES—INSOLVENCY—DISTRIBUTION OF RESERVE FUND.—A New York statute, under which the insolvent company was incorporated, provided that a reserve fund might be created for the payment of assessments or of claims under assessment policies. *Held,* one judge dissenting, the fund constituted a trust for the payment of such claimants to the exclusion of general creditors and beneficiaries under level premium policies. *Robinson* v. *Mutual Reserve Life Ins. Co.* (C. C. A. 2nd Cir. 1911) 189 Fed. 347.

No reason appears why a mutual insurance company may not be authorized by statute to designate a fund for the payment of beneficiaries of certain of its policy holders, especially where the fund is created by that class, so that it may not be reached by its general creditors or beneficiaries of another class, *San Francisco Union* v. *Long* (1898) 123 Cal. 107, although as regards the beneficiaries a true trust would not arise until there were death claimants. These, however, are considered creditors of the insurer, *Mayer* v. *Attorney-General* (1880) 32 N. J. Eq. 815, 820, and, though in the absence of statute a corporation may make preferences among its creditors, it is not sound policy to give this power to an insolvent company. See 2 Morawetz, Corporations, (2nd ed.) §§ 802-804; *cf. Gilbert* v. *Endowment Ass'n* (1903) 21 App. D. C. 344, 360. The existence and

exercise of a right to create a trust fund for certain creditors should, therefore, be clearly shown. The statute in the principal case, however, did not unequivocally authorize the exclusion of general creditors; and it would accordingly seem that an undue preference was made in the distribution of the reserve fund. *People ex rel.* v. *Life Ass'n* (1896) 150 N. Y. 94, 98, 115. But the claimants under level premium policies were rightly denied participation therein, in accordance with the association's constitution and by-laws by which their rights must be determined. *People* v. *Grand Lodge* (1898) 156 N. Y. 533, 537; *Farmers' Co.* v. *Aberle* (N. Y. 1896) 18 Misc. 257, 267. Even had there been a residue of the fund, therefore, their claims upon it should have been disregarded, for they were not in a position to impeach the company's action in setting aside the fund. *People ex rel.* v. *Life Ass'n supra.*

LIS PENDENS—ACTION RELATING TO LAND—PURCHASE IN ANOTHER COUNTY.—The defendant purchased land while a suit concerning it was pending against his vendor in a county other than the *situs* of the land. By statute, pending suits are notice "to all the world." (Civil Code 1910, § 4533.) *Held,* the defendant took subject to the decree in the previous suit. *Marshall* v. *Whatley et al.* (Ga. 1911) 72 S. E. 244.

Although purchasers during a pending action are said to be bound by its result because they are presumed to know of it, *Edwards* v. *Banksmith* (1866) 35 Ga. 213, the doctrine of *lis pendens* is really based upon the necessity of keeping the subject of litigation before the court. 7 COLUMBIA LAW REVIEW 282; *Newman* v. *Chapman* (Va. 1823) 2 Rand. 93. Even where pending suits are declared to be notice "to all the world," the operation of the rule of *lis pendens,* because of its harshness, has generally been confined to the jurisdiction in which the action is brought. See *Holbrook* v. *N. J. Zinc Co.* (1874) 57 N. Y. 616. By the better view, the full faith and credit clause of the Federal Constitution does not demand that the courts of other States give the doctrine of *lis pendens* extraterritorial effect. *Shelton* v. *Johnson* (Tenn. 1857) 4 Sneed 672; *contra, Fletcher* v. *Ferrell* (Ky. 1840) 9 Dana 372. Where personal property is sold abroad to a purchaser without actual notice, neither the foreign nor the domestic court will subject him to the operation of the rule. *Carr* v. *Lewis Coal Co.* (1888) 96 Mo. 149; *Shelton* v. *Johnson supra.* In the case of real property, however, there are judicial expressions indicating that the courts of the *situs* would not protect such purchasers. See *Benton* v. *Shafer* (1890) 47 Oh. St. 117; *Carr* v. *Lewis Coal Co. supra.* But in both classes of cases, under the facts of the principal case, purchasers *pendente lite* take subject to the decree, although a suit in one county cannot be notice in another. *Wood's Ex'r* v. *Wickliffe* (Ky. 1844) 5 B. Mon. 187. By statute in many jurisdictions notice of the pending action must be filed in the county where the land is situate. 2 Pomeroy, Eq. Juris, § 640.

MORTGAGES—RECEIVERSHIP—COLLECTION OF RENTS—RIGHTS OF SUBSEQUENT MORTGAGEES.—The plaintiff, a junior mortgagee, brought foreclosure proceedings, and secured the appointment of a receiver of the rents for his benefit. A senior mortgagee subsequently had the receivership extended to his own case, and sought to have the rents already collected by the receiver applied to repairing the premises.

Held, they need not be so applied. *Madison Trust Co.* v. *Axt* (1911) 130 N. Y. Supp. 371.

A mortgagor in possession is entitled to the rents and profits from the mortgaged premises until a mortgagee ousts him of possession, or by securing the appointment of a receiver, reserves them for himself. 1 Jones, Mortgages, (6th ed.) § 670. Where a junior mortgagee avails himself of the latter remedy before any action by a senior mortgagee, a court of equity will allow him to retain the rents and profits already collected as a reward for his diligence. *Sanders* v. *Lord Lisle* (1869) Ir. R. 4 Eq. 43; *Ranney* v. *Peyser* (1880) 83 N. Y. 1; but see *Beverley* v. *Brooke* (Va. 1847) 4 Gratt. 187. The exception to the general rule of priorities among mortgagees which is thus created is only an apparent one. The real effect of these proceedings is merely to vest in the subsequent mortgagee the defeasible rights of the mortgagor, see *Howell* v. *Ripley* (N. Y. 1843) 10 Paige 43, by transferring the usufruct of the premises to which a prior encumbrancer was not entitled until he had taken steps to enforce his mortgage. That no real exception exists is further demonstrated by those decisions which hold that the senior mortgagee will take precedence over the junior mortgagee with respect to rents and profits unless both the foreclosure proceedings and the application for a receiver have been instituted solely for the benefit of the latter. See *Cross* v. *Will County Nat. Bank* (1898) 177 Ill. 33; *N. J. Title etc. Co.* v. *Cone* (1902) 64 N. J. Eq. 45.

MUNICIPAL CORPORATIONS—POWERS—BORROWING MONEY.—A municipal corporation authorized the negotiation of a loan for the purchase of a lot and the erection of a town-hall. The charter authorized the purchase of land and the erection of buildings, but it was silent as to the power to borrow money except for two specified purposes. *Held,* the execution of the ordinance should be enjoined. *Rushe et al.* v. *Mayor, etc. of Hyattsville et al.* (Md. 1911) 81 Atl. 278.

Under the general doctrine that municipal corporations have only such powers as are expressly or impliedly granted to them in their charters, *Allen* v. *Lafayette* (1889) 89 Ala. 641, it is usually held that they cannot borrow money except when the legislative intendment is clearly in favor of the power, *Mayor* v. *Ray* (1873) 19 Wall. 468; *Hackettstown* v. *Swackhamer* (1874) 37 N. J. L. 191, in accordance with the rule that the grant of corporate powers is to be strictly construed against the municipality. *Ex parte Simms* (1898) 40 Fla. 432; see also *Luther* v. *Wheeler* (1905) 73 S. C. 83. Since the factors of personal responsibility and self-interest, which justify a different holding in the case of private corporations, are absent in the case of municipal officers, the restriction commends itself as an obstacle to fraud and to the contracting of improvident debts. See *Mayor* v. *Ray supra.* A contrary result has sometimes been reached on the ground that the prevailing doctrine entails injustice to the lender and impracticability in the management of municipal affairs. *Bank of Chillicothe* v. *Chillicothe* (1836) 7 Oh. St. Pt. II 31, 30 Am. Dec. 185; *Williamsport* v. *Comw.* (1876) 84 Pa. 495. It would seem, however, that this view overlooks the fact that although no recovery can be had for an *ultra vires* loan according to its terms, justice to the lender and safety to the municipality are both obtained by allowing a remedy in quasi-contract; *Luther* v. *Wheeler supra; Allen* v. *Lafayette supra; contra, Hackettstown* v. *Swackhamer supra;* and the further fact that a municipality may unquestionably contract

a debt with one actually employed in municipal work, the dangers incident to the borrowing power not being present in such case. *Ketchum* v. *Buffalo* (1856) 14 N. Y. 356; and see *Luther* v. *Wheeler supra.* The decision reached in the principal case accords, therefore, not only with the majority view but with sound reason.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ADMIRALTY RULE APPLIED IN STATE COURT.—Action was brought in a State court to recover for the loss of a launch caused by a collision with another vessel in a river. *Held,* if both vessels were negligent, the plaintiff could recover half his loss. *St. Louis & Tenn. R. Packet Co.* v. *Murray* (Ky. 1911) 139 S. W. 1078.

The Federal admiralty jurisdiction over inland waters, *The Genesee Chief* (1851) 12 How. 443, is not exclusive of the common law courts. *Thompson* v. *The Steamboat Morton* (1853) 2 Oh. St. 26. In the absence of statute, however, these tribunals universally apply the doctrine of contributory negligence, *Vanderplank* v. *Miller* (1828) 1 Moody & M. 169; *Broadwell* v. *Swigert* (Ky. 1846) 7 B. Mon. 39, where courts of admiralty, as in the case of collisions or other marine torts, will divide the loss between the negligent parties, *The Max Morris* (1890) 137 U. S. 1; *The Schooner Catharine* (1854) 17 How. 170, or, more rarely, apportion it to the degree of fault. *The Victory* (1895) 68 Fed. 395; 7 COLUMBIA LAW REVIEW 352. Historically, division of damages seems to be a rule of the water, which arose as a principle of natural justice from the peculiar peril of the sea long before the common law doctrine of contributory negligence appeared. Spencer, Marine Collisions, § 191; Marsden, Collisions of the Sea, (4th ed.) 141. Its fairness has so commended itself that the English common law courts have been empowered by statute to divide damages whenever courts of admiralty divide them. Williams & Bruce, Admiralty, (3rd ed.) 93. The principal case, however, is the first example in this country of the application of the admiralty rule by a common law court, and it would seem to be the result of judicial legislation. The stringency of the rule of contributory negligence has nevertheless been modified in other cases and the plaintiff's negligence considered not in defense, but in mitigation of his damages. *Alabama etc. Ry. Co.* v. *Coggins* (1898) 88 Fed. 455. The decision of the principal case is therefore not objectionable on the ground that the common law courts cannot determine relative degrees of fault. *R. R.* v. *Norton* (1855) 24 Pa. 465.

PARTNERSHIP—ILLEGAL PARTNERSHIP—ACCOUNTING OF PROCEEDS.—The plaintiff sought an accounting of assets held by his partner under a contract legal in itself, but directly connected with an illegal partnership. *Held,* he was not entitled to relief. *Kennedy* v. *Lonabaugh* (Wyo. 1911) 117 Pac. 1079.

In determining under what circumstances courts of equity will order an accounting of partnership assets tainted with illegality, the distinctions that have been suggested result in obscurity. Where the illegal transaction is executed, an accounting has been allowed upon the theory that recovery could be had in quasi-contract without reference to the original contract. *McDonald* v. *Lund* (1896) 13 Wash. 412; see *Crescent Ins. Co.* v. *Bear* (1887) 23 Fla. 50. Distinctions have also been suggested between an agreement *malum prohibitum* and

one *malum in se*, see *Farley* v. *St. Paul Ry. Co.* (1882) 14 Fed. 114, and between partnerships legal and illegal in their inception. See *Woodworth* v. *Bennett* (1871) 43 N. Y. 273, 276; 5 COLUMBIA LAW REVIEW 472. But since it is a general rule that equity will not in any way aid in the consummation of unlawful transactions, *The Highwayman's Case* (1725) 9 Law Quart. Rev. 197; *Watson* v. *Fletcher* (Va. 1850) 7 Gratt. 1, these attempted modifications seem unsound, if the plaintiff must in fact rely on an unlawful contract to establish his claim. *McMullen* v. *Hoffman* (1898) 174 U. S. 639; *Chi., etc. Ry. Co.* v. *Wabash Ry. Co.* (1894) 61 Fed. 993. Where, however, he can set up a cause of action unconnected with an illegal transaction, the reason for the rule disappears, and it has been correctly held that an accounting will be ordered, even though the partnership has also engaged in unlawful ventures. *Central Trust Co.* v. *Respass* (1902) 112 Ky. 606; *Anderson* v. *Powell* (1876) 44 Ia. 20. But the plaintiff in the principal case was clearly not entitled to relief, since his claim was not severable from the illegal agreement of partnership.

PARTNERSHIP—PARTNER'S AGENCY—EFFECT OF DISSENT.—A member of a commercial partnership of two gave promissory notes to a bank both before and after dissolution, against the proceeds of which he checked to pay the firm's debts. The bank had been forbidden by the other partner to advance money. *Held,* the bank can recover against the firm on the "original consideration" for the notes. *First National Bank* v. *Larsen et al.* (Wis. 1911) 132 N. W. 610.

On the theory of agency, Story, Agency, (8th ed.) § 124, every member of a trading partnership has the implied power of issuing negotiable paper, *Pinkney* v. *Hall* (1696) 1 Salk. 125, but this implication may be rebutted by notice to the obligee of a co-partner's refusal to be bound. *Gallway* v. *Mathew* (1808) 10 East 264. This broad statement of the rule has been limited in modern business practice, Pollock, Digest of Partnership, (8th ed.) 85, and it is generally declared that the will of the majority shall prevail. *Johnston* v. *Dutton's Adm'r* (1855) 27 Ala. 245; Burdick, Partnership, 231; *cf. Markle* v. *Wilbur* (1901) 200 Pa. 457. Where, as in the principal case, one of two partners dissents, to the knowledge of the obligee, the dissenter is not liable. *Leavitt* v. *Peck* (1819) 3 Conn. 124; see *Johnston* v. *Dutton's Adm'r supra; cf. Yeager* v. *Wallace* (1868) 57 Pa. 365. After dissolution of the partnership, the authority of one partner to issue paper is lost, *Potter* v. *Tolbert* (1897) 113 Mich. 486; *contra, Fulton* v. *Central Bank* (1879) 92 Pa. 112, unless, indeed, the issuance is merely in fulfilment of previously existing obligations. *Richardson* v. *Moies* (1862) 31 Mo. 430; *cf. Butchart* v. *Dresser* (1853) 10 Hare 453. While recognizing these principles, the court declared the defendants liable on the obligation incurred on the overdrafts; but the payment of these would clearly be included in the plaintiff's notice to the bank "not to lend any more money to the co-partnership." Therefore, such advances seem merely a voluntary payment for the benefit of another, and for this there should be no recovery. *McGlew* v. *McDade* (1905) 146 Cal. 553; *Gallway* v. *Mathew supra;* see *Askew* v. *Silman* (1895) 95 Ga. 678.

PERSONAL PROPERTY—ACCESSION—MEASURE OF DAMAGES.—Timber belonging to the plaintiff was cut and taken tortiously, but in good faith,

and sold to the defendant. *Held,* the measure of damages should be the value of the timber immediately after severance. *Wall et al.* v. *Holloman* (N. C. 1911) 72 S. E. 369. See Notes, p. 67.

REAL PROPERTY—CURTESY—EFFECT OF STATUTORY CIVIL DEATH.—After the plaintiff had been sentenced to prison for life under a statute declaring that one so sentenced should be deemed civilly dead, his wife contracted a second marriage which, under the Domestic Relations Law, was not void. The sentence of the plaintiff was commuted, and at her death he claimed curtesy in the wife's estate. *Held,* his claim should not be allowed. *Glielmi* v. *Glielmi* (1911) 131 N. Y. Supp. 373. See Notes, p. 70.

REAL PROPERTY—EASEMENTS AND PROFITS—ORIGIN OF CUSTOMARY RIGHTS.—The plaintiff sought an injunction restraining the defendants from fishing in a stream on his land. The defendants pleaded that the land in question was crown land at the time of the origin of the use, and therefore from the continued user a grant of the right should be presumed, which would operate to incorporate the inhabitants for purposes of the presumed grant. *Held,* The plea was bad. *Earl of Chesterfield* v. *Harris* (1911) 80 L. J. Ch. 626. See Notes, p. 69.

SALES—BILL OF LADING—RIGHTS OF TRANSFEREE.—The vendor drew on the vendee for the purchase price of goods consigned to itself, discounting the draft, with bill of lading attached, with the defendant bank. The vendee, having claims against the vendor in excess of the purchase price, attached the consignment. *Held,* the bank could not object to the attachment, since it could obtain reimbursement from funds of the vendor in its possession. *Wilson Grain Co.* v. *Central Nat. Bank* (Tex. 1911) 139 S. W. 996.

When a bill of lading is transferred for value, the legal title passes to the transferee, Burdick, Sales, (2nd ed.) § 116, who can successfully intervene when the consignment is attached by creditors holding claims against the shipper. *National Bank* v. *Milling Co.* (1897) 103 Ia. 518; *National Bank* v. *Walsh* (1907) 131 Ill. App. 508; *Marine Bank* v. *Wright* (1871) 48 N. Y. 1. The theory upon which this right is justified is not that the transferee has a superior lien, but that the shipper has no leviable interest in the property. *Leinkauf Co.* v. *Grell* (N. Y. 1901) 62 App. Div. 275; *Sabel* v. *Planters' Bank* (1901) 110 Ky. 299. Accordingly, the state of the account between the shipper and the bank has been regarded as immaterial. *Leinkauf Co.* v. *Grell supra; Tishomingo Sav. Inst.* v. *Johnson* (Ala. 1905) 40 So. 503. It is clear, therefore, that the shipment in the principal case could not be attached as the property of the shipper. Nor could it be claimed as the property of the vendee. If the bank's title was absolute, see *Lickbarrow* v. *Mason* (1787) 2 D. & E. 63, the vendee's only rights were against the vendor. If, on the other hand, the bank's title was clearly made conditional, and was to vest in the vendee upon payment of the draft, *Mirabita* v. *Imperial Bank* (1878) 3 Ex. Div. 164; Burdick, Sales (2nd ed.) §§ 116, 117, the bank would seem amply justified in requiring the performance of the condition, especially since it must act at its peril in surrendering the bill of lading. *McArthur* v. *National Bank* (1899) 122 Mich. 223.

SUBROGATION—CONTRIBUTION—PAYMENT BY A JOINT DEBTOR.—The plaintiff sought to recover from the defendant the latter's proportion of a note under seal which they had executed jointly and which the plaintiff had paid at maturity, taking an assignment thereof from the payee. The period within which an action on an implied contract might have been brought had elapsed. *Held,* two judges dissenting, the action was barred. *Liverman* v. *Cahoon* (N. C. 1911) 72 S. E. 327.

Although payment by a joint maker or a surety extinguishes an obligation at law, *Pray* v. *Maine* (Mass. 1851) 7 Cush. 253; *Hall* v. *Harris* (1909) 6 Ga. App. 822, wherever reimbursement is sought by a surety, equity will imply an assignment to him by the principal creditor, if there be none in fact, substituting him to the very debt itself, which is thus kept alive for some purposes. *Parsons* v. *Briddock* (1708) 2 Vern. 608; *Lumpkin* v. *Mills* (1848) 4 Ga. 343; *Burrows* v. *McWhann* (S. C. 1794) 1 Dess. 409. While the right to subrogation depends upon the right to contribution, the subrogee takes the exact place of the principal debtor; and the remedy which he seeks is not that provided by the legal or equitable action for contribution, but it is based upon the original obligation, *Lidderdale* v. *Robinson* (1827) 12 Wheat. 594. It seems, therefore, that this remedy should be co-extensive in time with that of the principal creditor and exist after the legal action for contribution is barred, for statutes of limitations go not to the right, but to the remedy. *Amer. Bonding Co.* v. *Mechanics Bank* (1903) 97 Md. 598; *contra, Burrus* v. *Cook* (1908) 215 Mo. 496. And since each joint promisor is to be regarded as a surety for the others for all above his interest, see *Martin* v. *Baldwin* (1845) 7 Ala. 923; *McCready* v. *Van Antwerp* (N. Y. 1881) 24 Hun 322, it is submitted that in the principal case relief might have been granted under the doctrine of subrogation. *Ackerman's Appeal* (1884) 106 Pa. 1; see Note to *Amer. Bonding Co.* v. *Mechanics Bank* 99 Am. St. Rep. 466, 531. The decision, however, accords with the narrow rule of its jurisdiction.

SUBROGATION—TRUSTEE'S INDEMNITY—RIGHTS OF CREDITOR OF INSOLVENT TRUSTEE IN RESPECT TO TRUST ESTATE.—An insolvent trustee had a right of indemnity at the hands of the *cestui que trust,* on account of a judgment debt contracted in the administration of the trust. This right the assignee in bankruptcy liquidated, and the judgment creditor claimed the sum so obtained in preference to general creditors. *Held,* the claim was well founded. *In re Richardson* (1911) 80 L. J. K. B. 1232. See Notes, p. 58.

VENDOR AND PURCHASER—ORAL CONTRACT—VENDEE'S LIEN—EFFECT OF POSSESSION.—Upon the vendor's refusal to convey land under an oral contract, the vendee claimed a lien thereon for the part of the purchase money paid. *Held,* since the vendee was not in possession, he had no lien. *Elliott* v. *Walker et al.* (Ky. 1911) 140 S. W. 51.

To the fact that courts of equity will take jurisdiction to decree specific performance of contracts for the sale of land, is attributable the theory that the vendor holds the property in trust for the vendee. This theory, coupled with the vendee's right to part performance if the vendor is unable fully to perform, is the basis of the vendee's lien. *Rose* v. *Watson* (1864) 10 H. L. C. 671; Fry, Specific Performance, (4th ed.) §§ 1479-1484; 1 Perry, Trusts, (5th ed.) § 231. As part

performance, the purchaser may either obtain a conveyance of such land as the vendor has, *Hooper* v. *Smart* (1874) L. R. 18 Eq. Cas. 683; *Jones* v. *Evans* (1848) 17 L. J. [N. S.] 469, or insist that it be held in trust for him until the purchase price is repaid. *Westmacott* v. *Robins* (1862) 4 De G. F. & J. 390; *Elterman* v. *Hyman* (1908) 192 N. Y. 113. If, on the contrary, the vendor can completely perform, but the vendee rescinds the contract, or if the contract be void *ab initio,* to give the vendee a lien would be to enforce a non-existing contract. *Davis* v. *Rosenzweig Realty Co.* (1908) 192 N. Y. 128; *Bishop* v. *Martin* (Conn. 1901) 65 S. W. 807; *contra, Cooper* v. *Merritt* (1875) 30 Ark. 686; see also *Torrance* v. *Bolton* (1872) L. R. 14 Eq. Cas. 124. Nevertheless, a lien is occasionally granted in these cases upon reasons of justice, see 8 COLUMBIA LAW REVIEW 571; *Whitbread Co.* v. *Watt* L. R. [1902] 1 Ch. 835, that are unconvincing, for the vendee seems entitled to no higher consideration than other *bona fide* creditors of the vendor. It follows, therefore, that since parol agreements are void by the Statute of Frauds in the jurisdiction of the principal case, the plaintiff was entitled to no lien. Nor could he rely upon the doctrine that a court of equity will refuse to disturb a vendee rightfully in possession until he is reimbursed, *Pilcher* v. *Smith* (Tenn. 1858) 2 Head 208, since he had never obtained possession.

VENDOR AND PURCHASER—VENDEE IN POSSESSION—TENANCY AT WILL.—The defendant, after entry under an agreement to purchase the land, defaulted in the payment of the purchase price. In a suit by the vendors to cancel the contract, which gave them the right to terminate it in this event, the defendant contended that he should have been given the statutory notice required to terminate tenancies at will. *Held,* the defendant was not the plaintiff's tenant. *Arnold et al.* v. *Fraser* (Mont. 1911) 117 Pac. 1064.

While the relation of landlord and tenant may exist between vendor and vendee, it can do so only as the result of a contract, express or implied. 1 Tiffany, Landlord and Tenant, § 43. But in the ordinary case of a vendee's taking possession while awaiting conveyance, there is no basis in fact for inferring an intention to create a tenancy during the continuance of the contract, *Carpenter* v. *U. S.* (1873) 17 Wall. 489; *Redden* v. *Barker* (Del. 1844) 4 Harr. 179; *contra, Gould* v. *Thompson* (Mass. 1842) 4 Metc. 224, and the purchaser is usually but the licensee of the seller. *Wright* v. *Moore* (N. Y. 1839) 21 Wend. 230. It is therefore generally recognized that the vendee is not liable for his use and occupation during that period, although the sale eventually fails of consummation by his default, *Vandenheuvel* v. *Storrs* (1819) 3 Conn. 203; *Smith* v. *Stewart* (N. Y. 1810) 6 Johns. 46, or that of the vendor. *Winterbottom* v. *Ingham* (1845) 7 Q. B. 611. Continued occupation after default, however, may justify the implication of a tenancy at will from that time. *Howard* v. *Shaw* (1841) 8 M. & W. 118. This inference is not possible in the principal case, since the character of the defendant's permissive possession remained unchanged until the plaintiffs exercised their option to terminate the contract. Since the defendant was not a tenant at will he was not entitled to the statutory notice required to terminate such tenancies, see *Powers* v. *Ingraham* (N. Y. 1848) 3 Barb. 576, although he could not be treated as a trespasser until his license to occupy the land had been revoked by demand for possession. *Den* v. *Westbrook* (1836) 15 N. J. L. 371; *Twyman* v. *Hawley* (Va. 1874) 24 Gratt. 512.

WILLS—VALIDITY—LAW GOVERNING.—The testatrix devised her property to her husband. *Held,* the validity of the devise was to be determined by the law in force at the time the will was executed, and not by that existing at the time of the death of the testatrix. *Harlan* v. *Harlan* (Conn. 1911) 139 S. W. 1063.

At common law a devise of realty was regarded as a present disposition, *Bunker* v. *Cooke* (1708) Rep. Temp. Holt 746, analogous to a conveyance to uses, *Arthur* v. *Bockenham* (1708) Rep. Temp. Holt 750, although it was to take effect only after death. Hence only the realty of which the testator was seised at the time the will was executed, could be devised, however clear the testator's intention to include after acquired property might appear. *Ballard* v. *Carter* (Mass. 1827) 5 Pick. 112. But a bequest of personalty was considered a nullity until the death of the testator, and it therefore included property acquired after the execution of the will. *In the Matter of Elcock's Will* (S. C. 1826) 4 McCord 39; *Sutton* v. *Chenault* (1855) 18 Ga. 1. In jurisdictions where the common law obtains, it is therefore apparent that the law governing devises of realty will be that of the time of the execution of the will. Statutes providing for the disposition of after acquired realty have nevertheless been construed to extend to wills executed before their enactment, since no vested right is thereby destroyed and since effect is thus given to the testator's intention, *Cushing* v. *Aylwin* (Mass. 1846) 12 Met. 169; *contra, Mullock* v. *Souder* (Pa. 1843) 5 Watts & Serg. 198, but statutes which would invalidate existing wills are apparently not so construed under the common law. *Ashburnham* v. *Bradshaw* (1740) 2 Atk. 37. Where testamentary gifts of realty are put on the same footing as bequests of personalty, the law controlling devices will obviously be that in force at the testator's death. Accordingly, in such a jurisdiction all statutes enacted after the execution of the will, regardless of their effect upon that document, will generally be considered in determining its validity. *Johnson* v. *Williams* (1890) 152 Mass. 414; *Lawrence* v. *Hebbard* (N. Y. 1850) 1 Bradf. Sur. 252; *contra, Lane's Appeal* (1889) 57 Conn. 182.